Supreme Court, U.S.
FILED

981659 APR 14 1999

OFFICE OF THE CLERK

(1)

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

WEN-CHOUH LIN,
PETITIONER

VS.

ANITA C.S. LIN,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
the Supreme Court of North Carolina and
the North Carolina Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Wen-chouh Lin
1315 Morreene Road
Apartment 10N
Durham, NC 27705
(919) 660-5902 (W)

1788

QUESTIONS PRESENTED FOR REVIEW

Whether the North Carolina Court of Appeals arbitrarily dismissed my appeal to prevent reviewing the deprivation of my liberty and retirement benefits without due process of law and the equal protection of the laws, on the ground that my brief contains 99 characters per line, while a case in similar or worse situation was not dismissed.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW ...	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
RULE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT ..	5
CONCLUSION	7

INDEX TO APPENDICES

Appendix A Dismissal of the North Carolina Court of Appeals	1a
Appendix B Order of the Supreme Court of North Carolina Denying Review	8a

TABLE OF AUTHORITIES

CASES PAGE

Abie State Bank v. Bryan, 282 U.S. 765 (1931) 7
Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987) 5
McCoy v. Shaw, 277 U.S. 302 (1928) 6
Michigan v. Long, 463 U.S. 1032 (1983) 7
N.A.A.C.P. v. State of Alabama, 357 U.S. 449 (1958) 6
Paris v. Woolard, 128 N.C. App. 416,
497 S.E.2d 283 (1998) 3,4
Staub v. City of Baxley, 355 U.S. 313 (1958) 6
Talent v. Talent, 76 N.C. App. 545, 334 S.E.2d 256 (1985) 4
Ward v. Board of County Com'rs of Love County,
253 U.S. 17 (1920) 6
Wolfe v. State of North Carolina, 364 U.S. 177(1960) 6

RULE

N.C.R. App. P. 26(g) 2,4

OTHER

Adequate State Ground, 24 L Ed 2d 837 6
1 *NC Index 4th* 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

WEN-CHOUH LIN,

PETITIONER

VS.

ANITA C.S. LIN,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
the Supreme Court of North Carolina and
the North Carolina Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The Order of the Supreme Court of North Carolina denying review appears at Appendix B to the petition and has been designated for publication but is not yet reported. The dismissal of the North Carolina Court of Appeals appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the Supreme Court of North Carolina decided my case was February 4, 1999. A copy of that order appears at Appendix B at 8a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RULE INVOLVED

Rule 26(g) of North Carolina Rules of Appellate Procedure provides:

> **Form of Papers; Copies.** Papers presented to either appellate court for filing shall be letter size (8½ x 11") with the exception of wills and exhibits. Documents filed in the trial division prior to July 1, 1982, may be included in records on appeal whether they are letter size or legal size (8½ x 14"). All printed matter must appear in at least 11 point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

STATEMENT OF THE CASE

The North Carolina Court of Appeals dismissed my appeal on the ground that my brief contains

approximately 99 characters per line as an unpublished opinion. (Appendix A at 2a, 7a)

I respectfully petitioned the Supreme Court of North Carolina for a discretionary review in conjunction with a notice of appeal (constitutional question). The question of dismissal was not presented for review, because a contrary decision of a simultaneous case in similar situation was not published in time for me to present said question. The Supreme Court of North Carolina dismissed my notice of appeal and denied me a discretionary review. I respectfully petitioned this Court for a certiorari, No. 97-2008, and a rehearing in vain. I respectfully petitioned the Supreme Court of North Carolina for a certiorari to review the questions as follows:

> I. ON THE GROUNDS THAT A TYPOGRAPHIC ERROR IS NOT AN ADEQUATE GROUND TO DISMISS AN APPEAL AND THE COURT DID NOT DISMISS A SIMULTANEOUS CASE IN SIMILAR OR WORSE SITUATION, THE COURT OF APPEALS WAS NOT FAIR TO DISMISS PLAINTIFF'S APPEAL WITHOUT ANY SUBSTANTIAL SUPPORT.
>
> In a simultaneous case, *Paris v. Woolard*, 128 N.C. App. 416, 419, 497 S.E.2d 283, 285 (1998), No. COA97-460, filed 20 January 1998, Judge Smith, who concurred in this appeal, noted that the appellant's brief does not appear in at least 11 point type and contains approximately 98 characters per line; nevertheless, the court addressed the argument and Judge John, the judge of this appeal, concurred.

In this case, No. COA97-339, filed 3 February 1998, Judge John dismissed plaintiff's appeal on the ground that his brief contains approximately 99 characters per line as an unpublished opinion and Judge Smith concurred. (Decision, pp. 2, 6 [Appendix A at 2a, 7a herein])

Plaintiff *pro se* was not aware of "65 characters per line", because it is not prescribed in N.C.R. App. P. 26(g). (Decision, p. 2 [At 2 herein]) Besides, the case of *Paris v. Woolard* was not published in time for him to present this question to this Court in his Notice of Appeal and Petition for Discretionary Review filed March 3, 1998. However, he obeyed at once and respectfully prayed this Court to forgive his typographic and harmless error. (Notice of Appeal, p. 4)

II. UNFAIRLY, THE COURT OF APPEALS DISMISSED PLAINTIFF'S APPEAL TO PREVENT REVIEWING THE DEPRIVATION OF HIS LIBERTY AND RETIREMENT BENEFITS WITHOUT DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS.

After dismissing plaintiff's appeal and then briefly addressing certain of his contentions, the court concluded the remaining assignments of error to be similarly without merit. (Decision, pp. 2, 6 [Appendix A at 2a, 7a herein]) Thus, the court avoided reviewing separately the questions that when both permanent alimony and equitable distribution are requested as in this case, the equitable distribution should be decided first. *Talent v. Talent*, 76 N.C. App. 545, 556, 334 S.E.2d 256, 263 (1985); that failure to specifically apply for equitable distribution

prior to a judgment of absolute divorce, as in this case, will destroy the statutory right to equitable distribution. *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987); and that plaintiff was deprived of liberty and retirement benefits without due process of law and the equal protection of the laws. (Notice of Appeal, pp. 5-13) And thus the court defeated the jurisdiction of this Court to review said questions, which affect every divorcing couple and are controlled by due process of law and the equal protection of the laws of both Federal and State Constitutions.

The foregoing reasons show that said "99 characters per line" in plaintiff's brief was an arbitrary and inadequate ground to dismiss his appeal. It is a mere device to avoid the review and defeat the jurisdiction of this Court. However, this Court may pass upon constitutional and public interest questions not reviewed below in the exercise of its supervisory jurisdiction, notwithstanding the appeal might be dismissed on procedural grounds. 1 NC Index 4th, Sec. 33, pp. 566-65, and cases there cited.

Id. at 2-5. The Supreme Court of North Carolina denied my petition on February 4, 1999. (Appendix B at 8a)

REASONS FOR GRANTING THE WRIT

ON THE GROUNDS THAT 99 CHARACTERS PER LINE IN MY BRIEF WAS NOT AN ADEQUATE GROUD TO DISMISS MY APPEAL AND A SIMULTANEOUS CASE IN SIMILAR OR WORSE SITUATION WAS NOT DISMISSED, THE NORTH CAROLINA COURT OF APPEALS ARBITRARILY

DISMISSED MY APPEAL TO PREVENT REVIEWING THE DEPRIVATION OF MY LIBERTY AND RETIREMENT BENEFITS WITHOUT DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS.

The foregoing facts show that said "99 characters per line" in my brief was an arbitrary and inadequate ground to dismiss my appeal. 24 L Ed 2d 837. Even worse, the North Carolina Court of Appeals defeated the jurisdiction of this Court to review said questions that are controlled by due process of law and the equal protection of the laws in the Fourteenth Amendment. See my Petition for a Writ of Certiorari in this Court, No. 97-2008. It is a mere device to prevent the review of a decision upon the federal question. *McCoy v. Shaw*, 277 US 302 (1928); and cases therein cited.

> It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support. N.A.A.C.P. v. State of Alabama, 357 U.S. 449, 455, 78 S.Ct. 1163, 1168, 2 L.Ed.2d 1488; Staub v. City of Baxley, 355 U.S. 313, 318-320, 78 S.Ct. 277, 280, 281, 2 L.Ed.2d 302; Ward v. Board of County Com'rs of Love County, 253 U.S. 17, 22, 40 S.Ct. 419, 421, 64 L.Ed. 751.

Wolfe v. State of North Carolina, 364 U.S. 177, 185-86 (1960).

> It is, of course, "incumbent upon this Court ... to ascertain for itself ... whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank v. Bryan*, 282 U.S. 765, 773, 51 S.Ct. 252, 255, 75 L.Ed. 690 (1931).

Michigan v. Long, 463 U.S. 1032, 1039 (1983).

CONCLUSION

For the foregoing reasons in this petition, as well as in the petition for a writ of certiorari, No. 97-2008, certiorari should now be granted.

Respectfully submitted,

Wen-chouh Lin
1315 Morreene Road
Apartment 10-N
Durham, NC 27705
(919) 660-5902 (W)

APPENDIX A

NO. COA97-339

NORTH CAROLINA COURT OF APPEALS

Filed: 3 February 1998

WEN-CHOUH LIN,
Plaintiff,
v.
ANITA C. S. LIN,
Defendant.

Durham County
No. 90 CVD 04498

Appeal by plaintiff from order entered 8 January 1997 by Judge Richard G. Chaney in Durham County District Court. Heard in the Court of Appeals 30 October 1997.

Wen-Chouh Lin, pro se, plaintiff-appellant.

Upchurch & Galifianakis, by Roger S. Upchurch, for defendant-appellee.

J0HN, Judge.

Plaintiff appeals the trial court's "Order of Distribution of Marital Property," contending, *inter alia*, that the court erred in determining that "an equal division of the marital property would not be equitable." We disagree.

Pertinent facts and procedural history are as follows: The parties were married 4 April 1964; on 13 November

1990, plaintiff filed a complaint for absolute divorce. Defendant's 18 December 1990 answer and counterclaim included a claim for equitable distribution. The parties were divorced 13 December 1994, the judgment providing that defendant's equitable distribution claim would survive entry of the divorce decree and remain pending for hearing on the merits.

On 19 September 1996, defendant filed a motion seeking "order of equitable distribution," a copy of which was served on plaintiff's attorney that same date. In an 8 January 1997 order, the trial court divided the benefits under plaintiff's retirement plan, describing the benefits as "[t]he only identifiable marital property to be divided between the parties." Defendant was awarded "fifty-five percent (55%) of the current value [of the plan] accumulated from April 4, 1964, until and including September 30, 1990." Plaintiff filed timely notice of appeal.

At the outset, we observe plaintiff's appellate brief is in clear violation of N.C.R. App. P. 26(g) (Rule 26(g). In *Lewis v. Craven Regional Medical Ctr.*, 122 N.C. App. 143, 147, 468 S.E.2d 269, 273 (1996) this Court interpreted Rule 26 (g) to require appellate briefs filed with this Court to be in a format allowing no more than ten characters per horizontal inch, or a maximum of 65 characters per line. Plaintiff's brief contains approximately 99 characters per line.

The appellate rules are mandatory and violation thereof subjects an appeal to dismissal. *Wiseman v. Wiseman*, 68 N.C. App. 252, 255, 314 S.E.2d 566, 567-68 (1984). Accordingly, plaintiff's appeal is hereby dismissed. Notwithstanding, in our discretion, *see*

N.C.R. App. P. 2, we briefly address certain of plaintiff's contentions.

The second of plaintiff's fourteen arguments asserts the trial court lacked jurisdiction to enter its equitable distribution judgment. This contention is totally unfounded.

First, defendant asserted a counterclaim for equitable distribution in her answer to plaintiff's divorce complaint and thus properly preserved her right to equitable distribution pursuant to N.C.G.S. § 50-11 (e) (1995). Further, when the divorce was granted 13 December 1994, the trial court's judgment specified that defendant's equitable distribution claim survived the entry of divorce and remained pending for hearing on the merits. Accordingly, the trial court did not lack jurisdiction to enter its equitable distribution judgment. *See Garrison v. Garrison*, 90 N.C. App. 670, 672, 369 S.E.2d 628, 629 (1988) (parties invoked jurisdiction of trial court by assertion of right to have marital property equitably distributed pursuant to G.S. § 50-20).

Plaintiff also vigorously maintains the trial court's determination that an equal division of the marital property would not be equitable was erroneous. The controlling statute is N.C.G.S. § 50-20 (1995), which provides in pertinent part:

> (c) There shall be an equal division ... of marital property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably.

The statute subsequently lists 13 factors to be considered by the trial court in making its determination. Of particular import is G.S. § 50-20 (c) (12), which allows the court to consider "any other factor which the court finds to be just and proper."

Our General Assembly has thus accorded the trial court broad discretion in its decision regarding what shall constitute an "equitable" division of marital property, and our review is limited to the "clear abuse of discretion" standard which accords great deference to the trial court's discretionary rulings. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Indeed, we may not overturn such a ruling unless it is shown to have been "so arbitrary that it could lnot have been the result of a reasoned decision." *Id.*

In the order *sub judice*, the trial court provided

> that an equal distribution of the marital property would not be equitable and that it would be equitable to distribute to Defendant-wife Anita C. S. Lin more than one-half of the marital property,

and subsequently set out its reasons for so determining as follows:

> [1.] The separation of the parties was brought about by the fault of the Plaintiff ... who abandoned the Defendant ... without adequate provocation in the latter part of September 1990 when the Defendant ... entered the hospital for major surgery. The Plaintiff ... thereafter willfully failed and refused to

provide adequate support for Defendant ... and a Judgment for alimony against [him] and in [her] favor ... was entered herein on October 11, 1991 .

[2.] Defendant ... was a faithful marital partner during the marriage and contributed at least her full share of time and effort, both directly and indirectly to the accumulation of the marital property through her services as spouse, mother of the children of the parties, homemaker and wage earner.

[3.] Defendant ... has had serious medical and health problems that hampered her efforts to support herself since she was abandoned by the Plaintiff .... She has had several jobs during said time of abandonment, but has never earned enough to support herself, and has found it necessary to borrow money for living expenses, causing her to incur debts of several thousands of dollars.

[4.] The Plaintiff ... at all times since the entry of alimony judgment, until he took a leave of absence from his job in the latter part of 1996, had been fully and gainfully employed, with a disposable monthly income increasing from approximately $1,700.00 in 1991 to approximately $2,092.00 in February 1996. In spite of such earnings, he has been found in contempt of court several times for willful failure and refusal to comply with the Court's orders. At the time of this hearing, Plaintiff ... was in contempt under order of the court, and as of Jan. 8, 1997 was in default in payments

> of alimony and attorney fees as shown by the Court's records in the amount of $21,835.57. A Judgment for Alimony Arrears against Plaintiff ... and in favor of the Defendant ... was entered in this action on October 22, 1996, in the amount of $9,869.57.
>
> [5.] The Sheriff of Durham County has been unable to find the Plaintiff ... for service of Orders to Show Cause in this Action. In attempting to locate the Plaintiff ... the Sheriff noted in his Return that the plaintiff's telephone was disconnected and that he had taken a leave of absence from his job at Duke University. He was located by telephone at one time in the State of Georgia. The Court finds that the Plaintiff ... left the State of North Carolina with intent to defraud his creditors, including the Defendant. . . .

Succinctly stated, the record fails to show the court's ruling "could not have been the result of a reasoned decision." *Id.* The court's order contained the foregoing detailed factual findings supporting its conclusions, and those findings reflect the court's consideration, in accordance with G.S. § 50-20, of relevant statutory factors including:

> (1) The income, property, and liabilities of each party at the time the division of property is to become effective;
>
> . . .
>
> (3) The duration of the marriage and the age and physical and mental health of both parties;

. . .

(5) The expectation of nonvested pension, retirement, or other deferred compensation rights, which is separate property;

(6) Any equitable claim to, interest in, or direct or indirect or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts of expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner of homemaker;

. . .

(12) Any other factor which the court finds to be just and proper.

G.S. § 50-20 (c). The trial court did not abuse its discretion.

In consideration of plaintiff's appearance *pro se*, we have also reviewed his remaining assignments of error and conclude them to be similarly without merit.

Appeal dismissed.

Judges LEWIS and SMITH concur.

Report per Rule 30 (e).

APPENDIX B

No. 511P98 FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(Wen-Chouh Lin v Anita C.S. Lin)

WEN-CHOUH LIN

v

ANITA C.S. LIN

From NC Court of Appeals
(COA97-339)
From Durham
(90CVD04498)

****

ORDER

Upon consideration of the petition filed by Plaintiff in this matter for a writ of certiorari to review the decision of the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 4th day of February 1999.

s/ Wainwright, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of February 1999.

Christie Speir Cameron
Clerk, Supreme Court of
North Carolina
s/ Carol B. Templeton
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Wen-Chouh Lin
Mr. Nick Galifianakis, Attorney at Law,
For Anita C.S. Lin
Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
Lexis-Nexis
Shephard's McGraw-Hill

Seal of the Supreme Court
of North Carolina